BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN THE MATTER OF:

J.C.

vs. NO. 00-61

STATE OF TENNESSEE DEPARTMENT OF EDUCATION

ORDER

WILLIAM T. AILOR
Administrative Law Judge
AILOR, HOUSE & BURNETTE
606 Main Avenue. Suite 202
(865) 525-9326
Knoxville, TN 37902

May 17, 2001

ORDER

This matter came on to be heard on the 20th day of February 2001 and continued on February 21st and concluded on March 8, 2001 before this Court on the Petition of [redacted], an adult, who had been committed to the Department of Children Services (DCS) while a minor on his Petition for a Due Process Hearing with the issues to be tried as set forth in the amended Pre-Hearing Order dated December 22, 2000 being as follows:

1. Whether or not DCS failed to assign a surrogate parent to the Petitioner from March 1998.
2. Whether or not DCS failed to use methods to insure that the Petitioner's parent could participate in the August 11, 1999 IEP team meeting.
3. Whether or not DCS failed to provide adequate prior written notice before the August 11, 1999 IEP team meeting.
4. Whether or not DCS failed to provide a copy of the procedural safe guards available to the parent of the Petitioner upon notification of the August 11, 1999 IEP team meeting.
5. Whether or not DCS failed to provide a free appropriate public education (FAPE) to the Petitioner from the time that he entered DCS custody in March of 1998 by failing to annually convene and IEP team meeting to review the Petitioner's IEP.
6. Whether or not DCS failed to provide the procedural safe guards required by State and Federal law thus denying the Petitioner a free appropriate public education by denying him Special Education and related services from March 1998 until his IEP team meeting at Taft Youth Development Center.

7. Whether or not DCS failed to re-evaluate the Petitioner's eligibility for Special Education Services upon his request.

Upon the case being called, the Petitioner, [redacted], an adult person, appeared along with his counsel, Mr. Lenny L. Croce and Ms. Theresa-Vay Smith, attorneys. Mr. Jeff Finney, DCS Education Consultant, appeared as the representative of the local educational agency(LEA), DCS, along with their attorney, Ms. Laura Levy, area legal counsel for the Legal Division of the Tennessee Department of Children Services.

FACTS

[redacted] at the time of this Hearing was a 19 year old adult male who was employed by Labor Ready, an agency for temporary employment of individuals in an as needed basis employment situation.

[redacted] came into the custody of the Department of Children Services as a 16 year old on March 6, 1998 for violation of probation as a result of failing a drug screen for cocaine and was placed on an indeterminate sentence. From that date until his release in December 2000, he was placed in various placements including Mountain View Youth Development Center, Taft Detention Center and various others designated hereinafter. At each of these placements, [redacted] attended the regular school setting until he was placed in Taft. Each of these placements was for different lengths of time. On June 22, 1999, [redacted] was placed in Mountain View Youth Development Center in Dandridge, Tennessee as a result of running away on numerous occasions from other less secure facilities which resulted in DCS requesting a waiver from the Commissioner of DCS and the Blount

County Juvenile Judge, William T. Benton.

PROOF

According to the testimony of Ms. Amanda Parrott. on March 12. 1998 the Petitioner was sent to Scott County Detention Center. He stayed there for 13 days and was then transferred to Hamblin County Detention Center and stayed there for 1 night. His next placement was at Freewill Baptist Home for Children for a period of 7 days and on April 2, 1998 was placed in CCS Adolescent Treatment Center, a 120 day program for alcohol and drug treatment. [redacted] stayed in that facility 78 days until June 19, 1998 at which time he ran away from the facility. He was returned to DCS custody on July 31, 1998 some 42 days later and was again placed in Freewill Baptist Home for Children where he stayed until August 27. 1998, some 27 days. Again, [redacted] ran away from this facility on August 27, 1998 and was absent without leave (AWOL) until October 5, 1998, some 38 days. He was placed in the runaway shelter from October 5, 1998 thru November 3, 1998. He was given a home pass to visit his mother who was terminally ill at the time. On November 19, 1998 he was returned to Freewill thru November 23, 1998 at which time he ran away from the home. On November 30. 1998 he was placed in emergency child services in upper East Tennessee. December 7 thru December 12, 1998 he was placed in Johnny Hall. a foster home until he ran away again. He was AWOL until February 12. On February 12 thru February 14. 1999 he was placed in Youth Emergency Shelter in Morristown on February 14. 1999 he went AWOL thru June 4. 1999. June 4 thru June 22, 1999 he was placed in Scott County Detention Center at which time he was removed to Mountain View Youth Development Center for excessive "run aways". He was held there for over 6 months until January 6, 2000 at which time he had completed the Mountain View program

and was stepped down to a less restrictive facility, Bradley County Group Home on January 14, 2000. [redacted] went AWOL again until February 23, 2000 at which time he was returned to Bradley County Youth Home thru March 8, 2000. At that time, he was returned to Mountain View where he stayed until June 23, 2000. By June 23, 2000 he again completed the program at Mountain View and was stepped down to a group home in Knox County called Westview. He went AWOL twice while at Westview, each time for just 1 night. He stayed at Westview until August 21, 2000 at which time he was returned to Mountain View until October 20, 2000 at which time he was transferred to Taft due to non-compliance of the Mountain View program with the agreement of the Judge. He was in Taft from October 20 until December 5, 2000 at which time he was released on an early termination due to his mother's declining health. (Exhibits 341 & 50)

According to Mr. Brody in exhibit 95, page 2, on 12-29-93 [redacted] was diagnosed as seriously emotionally disturbed and that school psychologist, S. McCormick, evaluated [redacted] on April 4, 1997 and concluded that he still met the criteria for seriously emotionally disturbed and was qualified to receive Special Education Services. He received those services and related services from Blount County Schools until placement in DCS custody on March 12, 1998. Ms. Parrott testified that a copy of Mr. McCormick's report was in her file which included the Blount County School records of [redacted]. (Exhibit 30, Tr. Vol. 1, page 16, line 19 - page 17, line 13) Mr. Brody based his information on the intake sheet presented to him. However, Mr. Fitts could not find [redacted]'s intake sheet. (T. Vol. 1, page 125, lines 3-7)

On June 29, 1999, Mr. Z.H. Brody, a licensed Psychological Examiner contractor with DCS, performed an initial psychological evaluation to classify [redacted] and recommend treatment for him. (Exhibit 95) The evaluation revealed that a verbal I.Q. of 87 with a performance

I.Q. of 105 and a full scale I.Q. of 97. The Woodcock Johnson psychological evaluation revealed a standard score of 70 in mathematics calculation and 88 in mathematics reasoning with a 75 in written expression. On July 6, 1999 the Classification Team met and recommended that an M-Team should convene to address discrepancies in the achievement test scores along with the previous history of receiving Special Education services. On August 11, 1999 the IEP Team meeting was held.

Mr. Brody did not address the criteria for SED (now ED). (Tr. Vol. 1, page 98, lines 6 - 9) Further, Mr. Brody made no recommendations about Special Education in his report (Tr. Vol. 1, page 99, line 24 - page 100, line 3). On examination of Mr. Jonathan A. Fitts, Special Education Co-ordinator at Mountain View Youth Development Center, he was asked about the report prepared by Mr. Brody (Exhibit 111 A) whereupon Mr. Fitts was asked if Mr. Brody compared the right scores on the right tests to which he responded, "according to this, no, he did not." (Tr. Vol. 1, page 114 lines 2 - 10) [redacted] was placed in regular classes and the GED program at Mountain View based on the fact that Mr. Brody did not recommend Special Ed services. According to Mr. Fitts, [redacted] did meet the criteria for Learning Disabled (Tr. Vol. 1, page 143 line 25- Page 144 line 7). He further stated that, " according to the IEP team, [that] he did meet the criteria, that his needs can be met in a regular classroom or curriculum." (Tr. Vol. 1, pages 144, lines 11-13) However, this was never mentioned in the documentation of Mountain View.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

With regard to the issues, the Court finds as follows:

1. Failure to provide to a surrogate parent for this student.

The Petitioner argues that under 20 USC § 1415(b)(2) and Tenn Comp R. and Regs. 0520-1-

9-.01(5)(a) the LEA should have appointed a surrogate parent for the Petitioner. In their post trial Brief, counsel for the Petitioner argued that, "the surrogate parent is responsible for representing the child in all matters relating to identification, assessment, educational placement, and the provision of a free appropriate public education including meetings concerning the individualized education program, and any Mediation and Due Process Hearing pertaining to the child." The LEA admits that no surrogate parent was assigned to [redacted] and that one was necessary as [redacted]'s mother was competent to serve in that role, and that [redacted] was not in the guardianship of the Department. The State further argues that although [redacted]'s mother was ill, she did visit [redacted] at Mountain View on three occasions after the M-Team meeting in August 2000.

Under Tenn. Comp. R. & Regs. 0520-1-9-.01(5)(a) the Petitioner has correctly recited the provisions of the Rules and Regulations. However, the Petitioner did not attempt to determine if the child was a ward of the State. Therefore, the Court has reviewed the definition of ward in Black's Law Dictionary 6th Edition, which states, "a person, especially a child or incompetent, placed by the Court under the care and supervision of a guardian or conservator." The Court then has reviewed the definition of guardian which states, "a person lawfully invested with the power, and charged with the duty of taking care of the person and managing the property and rights of another person, who, for defect of age, understanding, or self-control, is considered incapable as administering his own affairs, one who legally has responsibility for the care and management of the person or the estate or both of a child during its minority." The Respondent cites TCA § 39-1-102(10) which states, "Department children are committed to the Department for rehabilitation and treatment, not punishment."

Based on the foregoing, the Court finds that the Petitioner did not qualify under the definitions as a ward and therefore was not entitled to a surrogate parent under the Rules and Regulations and US Code.

The Court will consider issues 2. 3 and 4 together as they are so closely related to each other.

2. Failure to use methods to insure that the parent could participate in the August 11, 1999 IEP Team meeting;

3. Failure to provide adequate prior written notice;

4. Failure to provide a copy of procedural safeguards to parent.

The Petitioner cites 34 CFR § 300.345 and the Tenn. Comp. R. & Regs. 0540-1-9-.01(5)(b)(3) and (5) for the proposition that the public agency is to take steps to insure parental participation in IEP meetings either in person or otherwise including early enough notification and mutually agreed upon scheduling and that the notice must contain the purpose, time and location of the meeting, and who will attend. They argue that DCS did not send notice early enough or arrange other methods for participation by the mother and that the notice did not contain the necessary provisions and that the notice did not contain all of the items required by State and Federal law. The Respondents argue that notice was sent by certified mail, return receipt advising the mother of the date of the meeting and that the mother's rights and procedural safeguards available to her were contained in the notice. The proof was that the mother never participated in any of the meetings held at the facility for her son. This could be because she had to rely on her daughter to drive her and she was very ill. The LEA's testimony was that notice was sent to Ms. [redacted]. However, an actual copy of the notice sent to the parent was not contained in [redacted]'s file. (Tr. Vol. 1, page 129, lines

3 - 13) Mr. Fitts testified that, "the notice would be. would have been, it would have been a four page notice. That's one of the things that kind of disappeared out of his files after it was sent to Taft....." (Tr. Vol. 1. page 121. lines 9 - 20) Upon review of Exhibit 128 which is the certified mail, return receipt which Mr. Fitts testified is the return receipt of the notice sent to Ms. [redacted] of the IEP Team meeting to be held on August 11th showing a post-mark dated July 30, 1999 as the date it was mailed to Ms. [redacted]. On the opposite side of the return receipt card. it shows a post-mark of being received on August 10. 1999. one day before the IEP Team meeting. (Tr. Vol. 1, page 151. lines 3 - 13) The Court finds that if the notice which was sent was for the IEP team meeting, it was sent with sufficient time to be received prior to the meeting. If Ms. [redacted] did not accept or pick up her certified letter until one day before the hearing. the sender can not be responsible for that. The testimony was that Mountain View received no call from the mother requesting that the meeting be rescheduled. However, The Respondents did not supply sufficient proof to the Court that they complied with the State and Federal law regarding the contents of the notice sent nor were they able to supply a copy of the actual notice sent to Ms. [redacted]. The testimony of Mr. Fitts clearly showed that the notice and enclosures did not comply with the law. There was no copy of the parental procedural safeguards included. the list of rights included with the notice (Exhibit 287) did not fully explain all of the procedural safeguards available. It did not explain what records were maintained or how to obtain a copy of the records. It did not mention the mother's right to give or refuse to give consent for evaluations as well as other rights afforded a parent. The notice was wholly deficient.

Based on the foregoing, the Court concludes that the Respondent did meet the requirements

for mailing the notice to the parent of the Petitioner. However, Respondents did not meet the requirements that the School System provide a notice in accordance with Tenn. Comp. R. & Regs. 0520-1-9-.01(5)(b)(2). Additionally, the Respondents did not the mother sufficient notice of other ways she could participate in the IEP team process.

5. Failure to provide a free appropriate public education to [redacted] from the time he entered DCS custody in March 1998 by failing to annually convene an M-Team meeting to review the IEP of [redacted].

The Petitioners argue that [redacted] should have been given an annually IEP Team meeting. The School System argues that Mr. [redacted] was provided a free appropriate public education from the time he entered DCS custody of March 1998, and that they were unable to conduct an annual review IEP Team meeting as a result of [redacted]'s runaway status. A review of Exhibit 341 shows that [redacted] was in custody for a little over 75 days from April 2 thru June 19, 1998 at which time he could have received an annual review IEP Team meeting, but did not. CCS is a drug and alcohol rehabilitation program. After that placement, the only other opportunity that the LEA had available to it to conduct an IEP Team meeting an evaluations was when Mr. [redacted] was placed in Mountain View that being June 22, 1999. The School System should have conducted and evaluation on while Mr. [redacted] was in the CCS facility. DCS had a copy of his school records on March 20, 1998 (Tr. Vol. 1, page 15, lines 14 - 21) which should have given them adequate notice and time to conduct an annual evaluation.

The Court finds that DCS did fail to provide FAPE by not conducting an annual evaluation when it had an opportunity and the necessary information.

6. Failure to provide procedural safeguards required by State and Federal law denied [redacted] a free appropriate public education.

The Petitioners argue that the IEP Team meeting of August 11, 1999 de-certified [redacted] for Special Education and related services and as such prevented him from receiving the appropriate education and safeguards to which his was entitled under State and Federal law and as such he was unable to obtain his GED. The State argues that the paperwork may have been faulty from the first M-Team report which indicated that [redacted] was not eligible for services, but this was based on the decision that extra services could be best provided in the regular class. They further argue that the fact that 14 months later when [redacted] was in Taft and was determined to be eligible to receive Special Education services was simply a "philosophical differences" among staff. The Court focuses primarily on the testimony of Mr. Fitts in determining this issue. Mr. Fitts' credibility is extremely suspect based on his evasiveness when asked specific questions and additionally with regard his changing his answers. Initially, Mr. Fitts testified that [redacted] did not meet the criteria for Special Education. However, later in his testimony, he admitted that Mr. Brody did not review the data correctly, and that Mr. [redacted] did meet the criteria for Special Education services. Further, the Court is disturbed that certain key documents are missing from Mr. [redacted]'s file some of which the Court has already recited. Additionally, Ms. Linda Russell. GED teacher, testified that she keeps an individual file on each student but when asked if she still had Mr. [redacted]'s individual file she testified, "you know, it's funny that [redacted]'s is the only one that's disappeared out of all my papers, my whole file." [redacted] testified that he still has not passed the GED exam.

Further, [redacted]'s transcripts do not indicate that he has received much if any educational benefit.

Further, no transition plan was ever developed for Mr. [redacted] As a result, he testified that he has been unable to find meaningful employment as he lacks work experience and training. (Tr. Vol. 2, page 156, line 24 thru page 157, line 12) DCS should have prepared a transition plan for this student.

Accordingly, the Court that DCS denied Mr. [redacted] FAPE by decertifying him and not providing him with special education services.

7. Whether or not DCS failed to re-evaluate the Petitioner's eligibility for Special Educations services upon his request.

The Petitioners argued that the LEA should have conducted an individual assessment in accordance with Tenn. Comp. R. & Regs. 0520-1-9-.01(4)(f) as it was requested by [redacted] orally on several occasions. He testified that he asked Ms. Linda Russell, the GED instructor at Mountain View. (Tr. Vol. 2, page 195, lines 8 - 25) He also testified that he told Ms. Russell that was in Special Education prior to being committed to Mountain View. Further, Ms. Russell also testified that [redacted] requested Special Education services on a number of occasions. (Tr. Vol. 2, page 18, lines 4 -9) He also asked Ms. Betty Ragland, Assistant Principal at Mountain View and his counselor, Mr. Patrick Bohn. Ms. Russell testified told [redacted] that he did qualify for Special Education services. (Exhibit 270)

Although the Rules and Regulations state that an individual assessment should be performed every 3 years or more frequently if a child's parent requests it, under the circumstances in this case the Court determines that the School System should have conducted the assessment

as requested. [redacted]'s mother was extremely ill at the time and later passed away from this illness and did not participate in the educational process served [redacted] at the time. Based on the information available to the LEA an assessment should have been performed.

From all of which the Court finds that the Respondent did not comply with the State and Federal laws as required and IT IS THEREFORE ORDERED THAT:

1. [redacted] was a child with a disability and entitled to special education and related services between August 11, 1999 and November 20, 2000.
2. Special education and related services shall be provided until [redacted] turns 23 years old as compensatory education for the failure of the Respondent to provide FAPE.
3. The Petitioner shall be evaluated by an audiologist who has appropriate experience in Central Auditory Processing Disorder and all recommendations shall be implemented.
4. Respondents shall pay for all speech-language therapy and related services set forth in the November 20, 2000 IEP including transportation costs.

   Pay for all one-on-one tutoring costs to prepare the Respondent to take the General Equivalency Examination (GED) including transportation costs (If necessary)

   Payment of necessary costs associated with registration and taking the GED including transportation.
5. Preparation and implementation of a transition plan.
6. Payment of tuition for vocational training program selected by the Petitioner in accordance with the transition plan established.
7. Payment of a stipend equal to his hourly work wage for the hours he is not able to work as a result of educational or related services as long as he is attending and working toward his

GED or other vocational goal and is maintaining a minimum of a C average or is showing sufficient educational progress to prove that he is diligently working toward completion of his program. However, if he shows no initiative and does not do the work necessary, he should be dismissed from the class and the School System released from any further responsibility as to his education. The LEA has the right to review his progress on a monthly basis.

ENTERED THIS THE 17TH DAY OF MAY 2001.

WILLIAM T. AILOR,
Administrative Law Judge

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or may seek review in the United states District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order. In appropriate cases, the reviewing Court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of section 49-10-601 of the Tennessee Code Annotated.

Within sixty (60) days from the date of this order (or thirty [30] days if the Board of Education chooses not to appeal, the local education agency shall render in writing to the District Team Leader and the Office of Compliance, Division of Special Education, a statement of

compliance with the provisions of this order.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been mailed, with sufficient postage affixed thereto, to Mr. Lenny L. Croce and Ms. Theresa-Vay Smith, Attorneys for student. Rural Legal Services of Tennessee, Inc., Jackson Square, P.O. Box 5209, Oak Ridge, TN 37831, Ms. Laura Levy, Esq., 308 Home Avenue, Maryville, TN 37801 attorney for school system and Ms. Mary Walker and Mr. Kent Berkley, Attorneys for school system, Cordell Hull Building, 7th Floor, 436 6th Avenue North, Nashville, Tennessee 37243-1290 and on this the ____ ___ day of May 2001.

WILLIAM T. AILOR